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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-599

APPALACHIAN POWER COMPANY,

Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF APPEALS OF THE STATE OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

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October 21, 1975

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*The text of each West Virginia statute is printed in the separate APPENDIX TO JURISDICTIONAL STATEMENT submitted herewith.

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JURISDICTIONAL STATEMENT

Appalachian Power Company ("Appellant" or "Appalachian") appeals from orders of the Supreme Court of Appeals of West Virginia ("West Virginia Court") entered June 23, 1975 and July 29, 1975 upholding certain orders of The Public Service Commission of West Virginia ("Commission"). Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and should exercise its jurisdiction to determine the substantial questions presented.

Opinion Below

The order of the West Virginia Court entered June 23, 1975 and its denial of rehearing by order entered July 29, 1975 are not reported and no opinion was issued. The orders of the Commission upheld by the West Virginia Court were issued September 16, 1974, October 18, 1974, January 31, 1975, February 14, 1975

and March 21, 1975 in the Commission's Case No. 7083 and are not reported. A copy of each order is included in the separate Appendix.

Jurisdiction

This suit was brought to review orders of the Commission with respect to rates charged to Appalachian's retail utility customers.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2) to review by appeal a final judgment rendered on June 23, 1975 by the Supreme Court of Appeals of West Virginia, the highest court of that State in which a decision could be had, before which court there was drawn in question the validity of certain statutes of West Virginia on the ground of their being repugnant to the Constitution of the United States, and the decision of the West Virginia Court on June 23, 1975 was in favor of the statutes' validity. Appellant's motion for reconsideration and petition for rehearing which drew in question a further statute of West Virginia on the ground of such repugnance was denied by the West Virginia Court on July 29, 1975.

The statutes upheld by the West Virginia Court which are the subject of this appeal are: the Commission's order of September 16, 1974, as affirmed by its orders of October 18, 1974, February 14, 1975 and March 21, 1975; the Commission's order of January 31, 1975, as modified and affirmed by its orders of February 14, 1975 and March 21, 1975; and West Virginia Code, Chapter 24, Article 5, Section 1.

The Commission's order of January 31, 1975 was issued under West Virginia Code, Chapter 24, Article 2, Sections 3 and 4. Appellant's petitions for rehearing before the Commission and the Commission's order of

March 21, 1975 modifying and affirming its order of January 31, 1975 were filed and issued under West Virginia Code, Chapter 24, Article 1, Section 7, and Rule 19 of the Rules of Practice and Procedure of the Commission.

The proceeding before the West Virginia Court was brought pursuant to West Virginia Code, Chapter 24, Article 5, Section 1, which provides for review by that court of final orders of the Commission. Appellant's motion for reconsideration and petition for rehearing before the West Virginia Court was brought pursuant to that court's Rule XIII.

Appellant filed Notices of Appeal with the Clerk of the West Virginia Court on June 30, 1975 and October 14, 1975, and filed separate Notices of Appeal with the Commission on July 2, 1975 and October 14, 1975.

A copy of each order, West Virginia statute, rule and notice of appeal referred to above is set forth in the separate Appendix.

The following decisions sustain jurisdiction by appeal because the Commission's orders are "statutes" within the purview of 28 U.S.C. §1257(2): *Atchison, Topeka & Santa Fe Ry.* v. *Public Utilities Commission of California*, 346 U.S. 346, 348 (1953); *Bluefield Water Works & Improvement Company* v. *Public Service Commission of West Virginia*, 262 U.S. 679, 683 (1923); *Lake Erie & Western R.R.* v. *State Public Utilities Commission of Illinois*, 249 U.S. 422, 424 (1919); and *Grand Trunk Western Ry.* v. *Railroad Commission of Indiana*, 221 U.S. 400, 403 (1911).

The following decisions further sustain jurisdiction by appeal on the basis that the June 23, 1975 order of the

West Virginia Court, as upheld by its order of July 29, 1975, was a "final judgment" of the highest court of the state in which a decision could be had and a "decision" in favor of the validity of the statutes drawn in question: *Atchison, Topeka & Santa Fe Ry.* v. *Public Utilities Commission of California, supra,* p. 349; and *Napa Valley Electric Company* v. *Railroad Commission of California,* 251 U.S. 366, 372 (1920).

In the event that the West Virginia Court order of June 23, 1975, as upheld by its order of July 29, 1975, is construed as not being a "final judgment" or as not being a "decision" in favor of the statutes' validity within the meaning of 28 U.S.C. §1257(2), jurisdiction of this Court is invoked alternatively pursuant to 28 U.S.C. §1257(2) to review by direct appeal the final orders of the Commission rendered on October 18, 1974, February 14, 1975 and March 21, 1975.[1] In rendering these orders, the Commission acted in its quasi-judicial capacity by reviewing Appellant's petitions for rehearing and was therefore the highest court of the state in which a decision could be had. In such capacity the Commission rendered its "decisions" in favor of the validity of the September 16, 1974 and January 31, 1975 orders which are "statutes" drawn in question on the ground of their repugnance to the Constitution of the United States. See *Prentis* v. *Atlantic Coast Line,* 211 U.S. 210, 224-226 (1908), which recognizes that a state public utilities commission may be a "court" within the meaning of federal statutory provisions, and *Atlantic Greyhound Corporation* v. *Public Service Commission*

[1] *Nash* v. *Florida Industrial Commission,* 389 U.S. 235, 237 (1967). Docketing an appeal from the Commission's orders is timely made because the 90-day period commences at the same time as an appeal from the order of the West Virginia Court. No appeal could be taken prior to that date because the orders of the Commission were susceptible of being reviewed and reversed until that court had acted. See *Andrews* v. *Virginian Ry.*, 248 U.S. 272, 275 (1919).

of West Virginia, 132 W. Va. 650, 659, 54 S.E.2d 169, 174 (1949), which recognizes that the Commission possesses quasi-judicial powers.

It is intended that appeal is taken pursuant to the Notice of Appeal filed with the West Virginia Court on October 14, 1975. In the event that such Notice of Appeal is deemed not timely filed,[2] Appalachian appeals pursuant to its Notice of Appeal filed June 30, 1975 with the West Virginia Court.

In the event that appeal is not considered the proper mode of review, Appellant requests that the papers upon which this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. §2103.

Questions Presented

(1) Whether it is consistent with due process of law, under the Fourteenth Amendment to the Constitution of the United States, to deny Appalachian an opportunity to present evidence and have an adjudication upon its claim that the Commission's January 31, 1975 order is repugnant to the Fifth and Fourteenth Amendments to the Constitution of the United States in that the rates for electric service established by the Commission, and the more than $23 million of refunds ordered by the

[2] Appellant's Notice of Appeal filed October 14, 1975 was within 90 days of the West Virginia Court's denial of Appellant's motion for reconsideration and petition for rehearing on July 29, 1975. The timely petition for rehearing delayed the running of the 90-day period from the West Virginia Court's June 23, 1975 order because it operated to suspend the finality of that order until June 29, 1975. *Department of Banking of Nebraska* v. *Pink,* 317 U.S. 264, 266 (1942). However, see page 14, n. 22 and accompanying text *infra* for possible interpretation that Appellant's motion for reconsideration and petition for rehearing was not timely filed and therefore would not delay the running of the 90-day period.

Commission for the period July 29, 1971 through December 31, 1973, are confiscatory and deprive Appalachian of its property without just compensation and without due process of law?

(2) Whether, without permitting Appalachian an opportunity to present evidence of the actual financial results of its operations for the period July 29, 1971 through December 31, 1973, it is permissible under the doctrines of fair play and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States for the Commission to compel Appalachian to establish rates for electric service for such period and to refund more than $23 million to its customers in light of the procedural infirmities of this case which include, but are not limited to, reliance upon evidence of a period more than four years old at the time of the Commission's action?

(3) Whether it is consistent with due process and a fair hearing guaranteed by the Fourteenth Amendment to the Constitution of the United States for the Commission to permit an attorney to serve as Commission Staff counsel and as the sole signer of the Commission Staff brief, who, earlier in this same proceeding, had actively participated as counsel for an intervenor opposing Appalachian's proposed rates and had presented exhibits on behalf of such intervenor?

(4) Whether the Commission's order of September 16, 1974, which ordered Appalachian to "cease and desist its practice of 'repricing' coal purchased from affiliated interests for inclusion in the Fuel Adjustment Clause, . . ." is void and of no force and effect because it was issued without affording to Appalachian notice or opportunity to be heard, and without any supporting evidence in the record, in violation of basic constitutional principles of due process?

(5) Whether West Virginia Code, Chapter 24, Article 5, Section 1, as construed and applied in this case by the West Virginia Court to deny Appalachian a judicial hearing on its constitutional challenge to the Commission's rate orders, is repugnant to the Fifth and Fourteenth Amendments to the Constitution of the United States and therefore void?

Statement

Appalachian is a wholly-owned subsidiary of American Electric Power Company, Inc. engaged in the production, transmission and distribution of electric energy in West Virginia and Virginia. The rates which Appalachian charges its retail customers situated in West Virginia, and the terms and conditions of service affecting those customers, are regulated by the Commission.

Appalachian filed with the Commission on February 22, 1971 tariff schedules based upon a calendar year 1970 test period which increased rates by approximately 10.5% on an annual basis. The increased rates became effective on July 29, 1971 under bond and subject to refund. Hearings scheduled by the Commission concerning the reasonableness of these rates did not commence until April, 1973; the hearings were completed in December, 1973. On January 31, 1975, forty-seven months after Appalachian filed its rates, the Commission disallowed all but 14% of the requested rate increase, directed Appalachian to file new tariff schedules which would reflect the level of rates which the Commission found appropriate based on the 1970 test year, and ordered refunds to customers for amounts collected in excess of such level during the period since July 29, 1971.

The Commission's January 31, 1975 order, which was

issued nearly four years after the 1971 rate filing, acknowledged that the determination was made upon "a stale record"[1] and that "[t]wo of the three Commissioners who heard parts of the evidentiary record have since resigned from the Commission."[2] The Commission further stated:

> "In the event that this decision and order is unduly harsh to Appalachian Power Company because of events of late 1971 through 1974, so as to be contrary to the best interests of Appalachian's customers, the utility has available to it one of several alternate modes of relief available under our controlling statutes and regulations to spread the facts of the lag period upon the record." (Appendix, p. 18.)

Accordingly, Appalachian sought an opportunity to present evidence of its actual operating results in review proceedings before both the Commission and the West Virginia Court.

On February 7, 1975, Appalachian petitioned the Commission for rehearing with respect to its order of January 31, 1975. First, Appalachian alleged in its petition that the rates set by that order were "confiscatory,"[3] that the end result of the order "is at total variance with fundamental constitutional standards of a fair rate of return,"[4] citing *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944), and that results actually achieved through collections of revenue under bond for the period from July 29, 1971 "were not inconsistent with the fundamental constitutional criteria

[1] Appendix, p. 16.

[2] Appendix, p. 13.

[3] Petition of February 7, 1975 at p. 6. As a direct consequence of the January 31 order, Moody's Investors Services, Inc. on February 4 reduced Appalachian's mortgage bond rating from A to Baa and its debenture rating from Baa to Ba and on February 20 reduced Appalachian's commercial paper rating from Prime 2 to Prime 3. On April 10, 1975, when Appalachian was seeking to market additional bonds, Standard and Poor's reduced its rating on Appalachian's bonds from A to BBB and on the debentures from BBB to BB.

[4] *Id.* at p. 3.

set forth in the *Hope* case."[5] Second, in its memorandum accompanying the February 7th petition, upon citation to *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio (No. 2)*, 294 U.S. 79 (1935), which states on page 81 that " 'the rudiments of fair play' " are "made necessary" by the Fourteenth Amendment, Appalachian urged that "prior to ordering refunds, a regulatory body must examine the Company's actual experience during the refund period,"[6] and in both the petition and the memorandum Appalachian asserted its right to present evidence of such actual results at a rehearing and offered to present such evidence. Third, consistent with such requirements of due process and fair play, Appalachian further alleged that the Commission erred in rendering a decision which adopts conclusions from a Commission Staff brief signed solely by attorney McDonald, who previously had participated in the same proceeding by presenting exhibits and serving as counsel for a group opposing Appalachian's requested rate relief.[7] Fourth, Appalachian challenged the Commission's order of September 16, 1974 as having been rendered without notice and opportunity to be heard, and "without any evidence to support it in the record of this proceeding."[8]

On February 14, 1975, the Commission issued its interim order in response to Appalachian's February 7th petition. Among other things, this order scheduled oral argument with respect to: first, Appalachian's assertion that the approved rate levels were confiscatory as applied for the period from July 29, 1971; second, whether the record should be reopened to receive evidence of the actual results for the period commencing

[5] *Id.* at p. 6.

[6] Memorandum of February 13, 1975 at p. 2.

[7] Petition of February 7, 1975 at p. 4.

[8] *Ibid.*

July 29, 1971; and third, the impropriety of attorney McDonald's dual role in the case. The order also denied further consideration of the Commission's September 16, 1974 order.

On March 21, 1975, after completion of oral argument ordered on February 14, 1975, the Commission recognized "Appalachian's right to minimize its obligation to make refunds in excess of [authorized] collections made on and after January 1, 1974" and ordered that Appalachian be allowed to introduce evidence of its actual earnings experience for the period January 1, 1974 through March 31, 1975.[11] However, the Commission refused to recognize this right for the period July 29, 1971 through December 31, 1973 and denied Appalachian any opportunity to present evidence of its actual results for that portion of the refund period. The order stated with respect to the attorney McDonald issue that "[t]he ground for alleged error is entirely rejected by the Commission as without basis in law or fact or as a breach of ethics."[12] The Commission also confirmed its October 18, 1974 and February 14, 1975 denials of further consideration of its September 16, 1974 order. In conclusion, the Commission directed Appalachian to file new tariff schedules and to make refunds in accord with its order of January 31, 1975 for that portion of the refund period extending from July 29, 1971 through December 31, 1973.

Thus, the Commission's order of March 21, 1975, to the extent that it confirmed its September 16, 1974 and January 31, 1975 orders, was a decision in favor of the

[11] Appendix, pp. 67-68.

[12] Appendix, p. 68.

validity of such orders and against each of Appalachian's claims based upon repugnance to the Constitution of the United States as set forth herein and in Appalachian's petition to the Commission of February 7, 1975.

On April 7, 1975, Appalachian filed its petition with the West Virginia Court seeking review of the orders of the Commission dated September 16, 1974 and January 31, 1975. The petition and its accompanying note of argument renewed the constitutional claims asserted before the Commission: first, by stating that the " 'end result' of the Commission's orders deprives Petitioner of its property without due process and just compensation,"[13] and that "[t]he rate levels established by the Commission's order, based on 1970 data, are unconstitutional at least as applied to Appalachian's 1972 and 1973 operations,"[14] citing *Federal Power Commission* v. *Hope Natural Gas Co., supra,* and *Bluefield Water Works Improvement Company* v. *Public Service Commission of West Virginia, supra;* second, by stating that the Commission erred in ordering Appalachian "to refund monies collected between July 29, 1971, and December 31, 1973, without permitting Appalachian to introduce evidence as to its actual results during that period," citing *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio (No. 2), supra;*[15] third, by questioning whether the dual participation of attorney McDonald requires "a rehearing before the Commission in order to remove the appearance of prejudicial taint arising from the attorney's dual representation in the

[13] Petition of April 7, 1975 at p. 6.

[14] Note of Argument of April 7, 1975 at p. 11.

[15] Note of Argument of April 7, 1975 at pp. 1 and 5.

same administrative proceeding";[16] and fourth, by asserting that "[t]he Commission's arbitrary and unjust issuance of the [September 16, 1974] order without the required notice and hearing deprived Appalachian of the most fundamental Constitutional rights and, for that reason, the Commission's order is void."[17]

On June 23, 1975, the West Virginia Court made and entered an order that in its opinion Appalachian had "not shown itself entitled to the relief prayed for in its said petition," and "that the prayer of the petition for an appeal from, suspension and review, in this proceeding, be, and the same is hereby, denied."[18] Though no reference was made by the court to the federal questions duly raised before it,[19] it is clear that the West Virginia Court's decision of June 23, 1975 was a decision in

[16]Note of Argument of April 7, 1975 at p. 2.

[17]Note of Argument of April 7, 1975 at p. 18.

[18]Appendix, p. 72.

[19]Any question with regard to duly raising the federal questions before the West Virginia Court is resolved by referring to the "Statement of the Respondent, Public Service Commission of West Virginia, of its Reasons for the Entry of its Orders of September 16, 1974, October 18, 1974, January 31, 1975, February 14, 1975 and March 21, 1975, in Case No. 7083," which was dated April 22, 1975 and filed with the West Virginia Court in response to Appalachian's April 7, 1975 petition.

First, the Statement reads: "The end result of the Commission's orders does not unconstitutionally confiscate Appalachian's property for the period July 29, 1971 to December 31, 1973." p. 16.

Second, in its response to Appalachian's demand to have an opportunity to present actual operating results, the Statement proposes that the Commission's independent examination of Appalachian's coverage levels satisfied "the constitutional tests of the *Hope* and *Bluefield* cases . . ." p. 13.

Third, though not specifically referring to the United States Constitution, the Statement finds at p. 23 no impropriety in attorney McDonald's conduct under Canon 9 of the Code of Professional Responsibility which, consistent with the requirements of due process, dictates that "a lawyer should avoid even the appearance of professional impropriety."

Fourth, the Statement asserts that the September 16 and October 18, 1974 orders of the Commission "did not unconstitutionally deprive Appalachian of its property without due process of law." p. 24.

favor of the validity of the Commission's order of September 16, 1974, as affirmed, and its order of January 31, 1975, as amended and affirmed, within the meaning of 28 U.S.C. §1257(2). *Atchison, Topeka & Santa Fe Ry.* v. *Public Utilities Commission of California, supra,* p. 349; and *Napa Valley Electric Company* v. *Railroad Commission of California, supra,* p. 372.

Thereafter, Appalachian filed its Notices of Appeal to the Supreme Court of the United States with the West Virginia Court on June 30, 1975 and with the Commission on July 2, 1975. Appalachian also filed with the Commission, under protest and in compliance with paragraph 2 of its order of January 31, 1975, as amended, revised tariff sheets for the period July 29, 1971 through December 31, 1973.

On July 23, 1975, Appalachian filed with the West Virginia Court its motion for reconsideration and petition for rehearing of that court's order of June 23, 1975. Appalachian's motion, as amended on July 29, 1975, raised the fifth federal question brought in this appeal by alleging that the West Virginia Court had:

> "erred in its Order of June 23, 1975, in that, by denying Appalachian's clear right to present evidence in a judicial forum supporting its claim that rates established by the Commission under its Order of January 31, 1975, are confiscatory and that refunds ordered thereunder are unlawful, this Court denied Appalachian the minimum standards for due process set forth in the constitutions and laws of the State of West Virginia and the United States of America, and construed and applied West Virginia Code Chapter 24, Article 5, Section 1 in a manner repugnant to the fourteenth amendment to the constitution of the United States of America." Amendment and Revision of Motion for Reconsideration and Petition for Rehearing of July 29, 1975 at pp. 1 and 2.

The fifth question was raised at this time because, in reliance on the plain language of the statute,[20] Appalachian had expected the West Virginia Court to issue the kind of decision due process would require. Only after the court had summarily declined to decide the controversy before it was Appalachian in a position to challenge the constitutionality of the statute, as so interpreted by the West Virginia Court. *Missouri ex rel. Missouri Insurance Company* v. *Gehner*, 281 U.S. 313, 320 (1930). See also, *Saunders* v. *Shaw*, 244 U.S. 317, 320 (1917).[21]

On July 29, 1975, the West Virginia Court rejected without discussion Appalachian's July 23 motion and petition on the ground that it was "not timely filed" even though the petition was filed within the time period specified by the court's rule on petitions for rehearing. As the motion and petition clearly was filed in accordance with the court's rules,[22] Appalachian submits

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[20]". . . [t]he court shall decide the matter in controversy as may seem to be just and right." West Virginia Code, Chapter 24, Article 5, Section 1; Appendix to Jurisdictional Statement, p. 94.

[21]The West Virginia Court has in the past held that:

". . . an order of the public service commission based upon a finding of facts which is contrary to the evidence, or is not supported by the evidence, or is arbitrary, or is based upon a mistake of law, will be reversed and set aside by this Court upon review. [citations omitted]" *United Fuel Gas Co.* v. *Public Service Commission of W. Va.*, 143 W. Va. 33, 46, 99 S.E.2d 1, 9 (1957).

[22]"Rule XIII—Rehearing.

1. How obtained. All petitions for rehearing must be filed in the clerk's office not later than thirty days from the date of the decision complained of . . . ." Rules of Practice in the Supreme Court of Appeals of West Virginia, West Virginia Code, Vol. 1 (1973 Replacement Volume); Appendix to Jurisdictional Statement, p. 97.

The order to which the motion and petition was addressed was issued June 23, 1975; the motion and petition was filed on July 23, 1975; thus the motion for reconsideration and petition for rehearing was filed in accordance

(footnote continued on next page)

that the repugnance of West Virginia Code, Chapter 24, Article 5, Section 1, to the Constitution of the United States was properly drawn in question in proceedings below.

On October 10, 1975, the Commission ordered rates into effect for the period July 29, 1971 through December 31, 1973, thereby requiring that cash refunds of over $23 million, including interest, be completed by February 7, 1976 in accordance with its order of January 31, 1975, as amended. On October 14, 1975, Appalachian filed its second Notices of Appeal to the Supreme Court of the United States with the Clerk of the West Virginia Court and with the Commission.[23]

(footnote continued from preceding page)

with the rule. This Court must look behind the machinations of the West Virginia proceeding and act to vindicate the federal rights of Appalachian. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 455 (1958); *Staub* v. *Baxley*, 355 U.S. 313, 318-320 (1958); *Ward* v. *Love County*, 253 U.S. 17, 22 (1920). As was said in *Wolfe* v. *North Carolina*, 364 U.S. 177, 185 (1960), "It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward nonfederal grounds of decision which are without any fair or substantial support. [citations omitted]"

[23]By application dated September 8, 1975, Appellant requested this Court to extend for 60 days the time within which Appellant was required to docket its appeal pursuant to Notices of Appeal filed June 30 and July 2, 1975. Appellant at that time intended to institute before the United States District Court for the Southern District of West Virginia an action pursuant to 28 U.S.C. §2281 for an injunction to restrain enforcement by appellee of its orders which are the subject of this appeal. Appellant was granted a 30-day extension of the time to docket an appeal to and including October 22, 1975. In the meantime Appellant has decided against instituting the action before the District Court.

The Questions are Substantial

The questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution. The grounds and reasons for this statement are as follows:

The procedures practiced by the Commission and by the West Virginia Court in the proceedings below have violated the Due Process Clause of the Fourteenth Amendment and the Just Compensation Clause of the Fifth Amendment as made applicable to the states by the Fourteenth Amendment. *Duncan* v. *Louisiana*, 391 U.S. 145, 148 (1968). These provisions require that a person be afforded an opportunity to present evidence and have a decision upon such evidence before a state, by its courts or administrative agencies, may deprive it of its property and further require that any such taking of property may be accomplished only upon just compensation to its owner. By imposing the rate levels prescribed in the Commission's January 31, 1975 order which Appalachian has sought to prove are confiscatory and by ordering cash refunds of over $23 million[24] to Appalachian's customers, while refusing to hear evidence of Appalachian's actual earnings during the refund period, and by issuing its cease and desist order of September 16, 1974 without affording Appalachian notice or opportunity to be heard, the State of West Virginia has exceeded the bounds of constitutionally authorized regulation.

The procedures followed by the Commission and the West Virginia Court in this case have repeatedly denied Appalachian its basic constitutional right to present evidence at a hearing and, in addition to depriving Appalachian of its property without due process of law, may

[24]This amount is more than 100% of Appellant's 1970 net operating income per books attributable to West Virginia operations.

set a dangerous precedent for similar transgressions in the future. The relief which Appalachian has sought has been the opportunity to present evidence of its actual results for the refund period—and that basic right to be heard has been summarily denied throughout the state procedure.

Although administrative powers may be far-reaching and judicial review may be limited, the Constitution of the United States guarantees to both individuals and corporations certain fundamental rights. Procedural due process is the mainstay of those rights and must not be compromised. Resolution of the issues in this case transcends state boundary lines and is vital to the protection of virtually every business in the country subject to administrative regulation.

Summary

The United States Supreme Court has jurisdiction of this appeal because the highest court of the State of West Virginia has upheld, against claims of repugnance to the Constitution of the United States, a statute of the State of West Virginia and orders of the Commission which are "statutes" within the terms of 28 U.S.C. §1257(2).

Enforcement of the orders of the Commission, as upheld by the West Virginia Court, and without an evidentiary hearing and judicial determination thereon, is repugnant to the Constitution of the United States by depriving Appalachian of its property without due process and without just compensation.

The extraordinarily stale test period evidence and numerous other procedural faults permeating this proceeding require that Appalachian be afforded an opportunity to present evidence of actual results in order to

comport with constitutional requirements of fair play and due process.

The participation before the Commission in this proceeding of attorney McDonald by serving as counsel and presenting exhibits for an intervenor, and his subsequent participation as the Commission's Staff counsel, creates an appearance of impropriety which vitiates Appellant's constitutionally guaranteed due process.

Due process compels the conclusion that the Commission's September 16, 1974 order is void and unenforceable for having been promulgated without affording Appellant notice or opportunity to be heard.

West Virginia Code, Chapter 24, Article 5, Section 1, is constitutionally invalid as interpreted by the highest court of the State of West Virginia by depriving Appalachian of judicial review of the Commission's legislative acts.

The Supreme Court has Jurisdiction to Review by Direct Appeal

The instant appeal is properly brought under 28 U.S.C. §1257(2) from the summary order of the Supreme Court of Appeals of West Virginia of June 23, 1975, as upheld by its order of July 29, 1975, which effectively sustained the orders of the Commission of September 16, 1974 and January 31, 1975, as amended and affirmed. *Atchison, Topeka & Santa Fe Ry.* v. *Public Utilities Commission of California, supra,* pp. 348, 349; *Bluefield Water Works & Improvement Company* v. *Public Service Commission of West Virginia, supra,* p. 683; *Lake Erie & Western R.R.* v. *State Public Utilities Commission of Illinois, supra,* p. 424; and *Grand Trunk Western Ry.* v. *Railroad Commission of Indiana, supra,* p. 403.

In *Atchison*, the California Commission issued orders requiring installation of grade separations at certain railroad crossings and allocating part of their cost to the appellant under provisions of the California Code. On petitions to the Supreme Court of California that court summarily denied review of the Commission orders. On appeal, this Court said:

> "We think the Commission's orders must be treated as an act of the legislature for purposes of determining our jurisdiction under 28 U.S.C. §1257(2). [citations omitted]" *supra,* p. 348.

This Court noted that the appellant had presented squarely to the Supreme Court of California its contention that, in the allocation of costs, the Commission's orders had taken appellant's property without due process of law and that in sustaining the Commission's orders by denying writs of review, the Supreme Court of California had upheld the statute as applied by the Commission, and the case was therefore properly before the Supreme Court of the United States on appeal.

In *Bluefield*, the Court decided that the validity of an order prescribing rates may be reviewed on appeal. The Court said:

> "The prescribing of rates is a legislative act. The commission is an instrumentality of the State, exercising delegated powers. Its order is of the same force as would be a like enactment by the legislature. If, as alleged, the prescribed rates are confiscatory, the order is void. Plaintiff in error is entitled to bring the case here on writ of error and to have that question decided by this Court." *supra,* p. 683.

The instant proceeding is properly brought to this Court by appeal under 28 U.S.C. §1257(2).

Appellant Must Not be Deprived of Its Property without Just Compensation Determined upon Evidence in a Judicial Proceeding

Due process requires that citizens be given access to a judicial forum for vindication of constitutional rights. See *Truax* v. *Corrigan*, 257 U.S. 312, 332-334 (1921); and *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring). These rights include an opportunity to present evidence and have a judicial determination upon the citizen's assertion that it has been deprived of its property without due process of law:

> "... [W]hen [a property owner] appropriately invokes the just compensation clause, he is entitled to a judicial determination of the amount. The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it. [citations omitted]" *Baltimore & Ohio R.R.* v. *United States*, 298 U.S. 349, 368-369 (1936); *see also Georgia Ry. & Electric* v. *Decatur*, 295 U.S. 165, 170-171 (1935).

By its petition for rehearing before the Commission, Appalachian challenged the Commission's January 31, 1975 rate order as being confiscatory and sought an opportunity to present evidence to the Commission in support of, and to have an adjudication of, its claim of confiscation. The Commission by its order of March 21, 1975 denied Appalachian this opportunity for the period July 29, 1971 through December 31, 1974.

Appalachian then utilized the statutory remedy provided by West Virginia law to renew its protest that the Commission's January 31, 1975 order, as affirmed in part by its March 21, 1975 order, is confiscatory and sought a remand to the Commission to receive and act on Appalachian's evidence. The West Virginia Court by

its orders of June 23, 1975 and July 29, 1975 denied the review and remand.

On a claim of confiscation, a utility is not limited to review of the evidence developed before a commission during the rate-making process. This Court in *Baltimore & Ohio R.R.* v. *United States, supra*, pp. 368-372, said that a utility during the legislative rate-making process is not required to foresee that confiscatory restitution would be required; it is not bound, in advance of a commission's findings and report, to set up a fear of transgression of its constitutional rights; and a utility may presume that a commission will keep within the law.

Evidence utilized by the Commission in its legislative capacity to establish Appalachian's rates for the refund period is not a sufficient record in a judicial forum when a constitutional attack of confiscation is made upon those rates. Appalachian is entitled under the Due Process Clause to introduce evidence in a judicial forum and have a judicial determination made based upon that evidence on the issue of confiscation. *Baltimore & Ohio R.R.* v. *United States, supra*, pp. 363-369.

In *Baltimore & Ohio*, railroad companies attacked as confiscatory an order of the Interstate Commerce Commission prescribing divisions of rates between carriers. Following unsuccessful efforts by the railroad companies to obtain a rehearing before the Commission, they instituted an injunction action in a federal district court to enjoin enforcement of the order. At the trial the Commission moved that no evidence be received other than that contained in the record before the Commission. Although the district court denied the motion, the United States Supreme Court on appeal found it necessary to decide what, in respect of admission and consideration of evidence, should have been the scope of the trial in the district court. In its decision on this issue, this Court found that

"[t]he district court rightly held [the railroad companies] entitled to introduce evidence in addition to that contained in the record before the commission, and rightly proceeded, upon consideration of all the evidence, to make findings and, upon the basis of the facts that it found, to decide upon the constitutional question." *supra*, p. 372.

In its opinion, the Court in *Baltimore & Ohio* said that in prescribing divisions the Commission was exercising a legislative function and went on to assert:

"The just compensation clause may not be evaded or impaired by any form of legislation. Against the objection of the owner of private property taken for public use, the Congress may not directly or through any legislative agency finally determine the amount that is safeguarded to him by that clause. If as to the value of his property the owner accepts legislative or administrative determinations or challenges them merely upon the ground that they were not made in accordance with statutes governing a subordinate agency, no constitutional question arises. But, *when he appropriately invokes the just compensation clause, he is entitled to a judicial determination of the amount.* The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it. [citations omitted]" *supra*, pp. 368-369. [emphasis supplied].

Appalachian does not dispute the proposition that, where a full and fair hearing of all justiciable issues has been held before a properly constituted administrative tribunal exercising judicial functions, review on appeal may be limited without violating the Due Process Clause. *See Alabama Public Service Commission* v. *Southern Ry.*, 341 U.S. 341, 348-350 (1951). Nor does it

deny that once a full adjudicatory hearing upon an evidentiary record has been held, whether by court or administrative agency, "due process does not require that a decision made by an appropriate tribunal shall be reviewable by another." *St. Joseph Stock Yards Co.* v. *United States*, *supra*, p. 77 (Brandeis, J., concurring).

However, "[a] hearing is not judicial, at least in any adequate sense, unless the evidence can be known." *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio (No. 1)*, 294 U.S. 63, 69 (1935); *accord, Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 304 (1937). The only evidentiary record in this proceeding was made while the Commission acted in a legislative capacity;[25] was based upon a record which was so stale as to be constitutionally invalid for purposes of ordering refunds; and was made before any constitutional challenge could be made to the rates ultimately prescribed. To shield the Commission's legislative actions from judicial scrutiny by denying a hearing and opportunity to present evidence on the constitutional issue of confiscation in a judicial forum, whether before the Commission in a judicial capacity or before a court, and to deny opportunity for a determination on such evidence, is a denial of due process. *St. Joseph Stock Yards Co.* v. *United States*, *supra*, p. 51-52.

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[25]The Commission has acted in both legislative and judicial capacities in this case. By establishing rates in its order of January 31, 1975, the Commission acted in a legislative capacity. *Bluefield Water Works* v. *Public Service Commission of W. Va.*, *supra*, p. 683. Thereafter, in response to allegations that the rates established were confiscatory and demands for an opportunity to challenge them as invalid under the constitution, the Commission acted in a judicial capacity by its orders of February 14, 1975 and March 21, 1975 to the extent that such orders affirmed the January 31, 1975 rates and denied Appalachian's request to present evidence of actual earnings in the refund period. *Morgan* v. *United States*, 298 U.S. 468, 480 (1936) (hereinafter cited as *Morgan I*); *Atlantic Greyhound Corp.* v. *Public Service Commission of W. Va.*, *supra*, p. 659, 54 S.E. 2d p. 174.

Fair Play and Due Process Require that Appellant be Afforded an Opportunity to Present Evidence of its Actual Results and to have a Judicial Determination Thereon

If the rudiments of due process are to be salvaged in this proceeding, the absolute minimum relief required is for Appalachian to have an opportunity before the Commission or another competent tribunal acting in a judicial capacity to present Appalachian's actual experience during the period July 29, 1971 through December 31, 1973.[26] It is upon the allegedly excessive revenues received during such period that the Commission has based its order that Appalachian refund to its customers in excess of $23 million.

The most egregious of the numerous procedural transgressions to which Appellant has been subjected is the regulatory lag which resulted in rates being promulgated more than four years after the test period upon which they were based. Part of this delay was incurred in the 13-month period elapsed from the end of hearings in late 1973 to the decision rendered on January 31, 1975 in direct contravention of the standard set by West Virginia Code, Chapter 24, Article 2, Section 4, which requires that final decision be rendered within three months after completion of hearings. If, as the Commission contended in its Statement to the West Virginia Court,[27] this statute is only "directory and not mandatory," it is at least indicative of the due procedural bounds within which the Commission is to exercise its delegated legislative powers.

[26]The Commission, by its March 21, 1975 order, has already afforded Appellant similar relief for the period January 1, 1974 through March 31, 1975.

[27]Statement dated April 22, 1975, *supra*, p. 17.

It is characteristic of this proceeding that the Commission, while finding that Appalachian's interest coverage on debt if no rate relief had been allowed would have been only 1.93 times at year-end 1972 and 1.99 times at year-end 1973,[28] denied all but 14% of the rate relief requested and arbitrarily refused to hear evidence of Appalachian's actual financial results for the period July 29, 1971 through December 31, 1973. Yet the Commission has allowed corresponding evidence to be presented for the period commencing January 1, 1974.

The Commission purports to overcome its superficial determination with respect to interest coverage on debt by its independent examination of Appalachian's annual reports submitted to the Commission for the years 1972 and 1973 which were not presented as evidence in this proceeding.[29]

This Court has specifically rejected such resort to annual reports not present in the record. In *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio (No. 1)*, *supra*, p. 70, it was stated that "the weakness of the case for the appellee is that the fundamentals of a fair hearing were not conceded to the company. Opportunity did not exist to supplement or explain the annual reports . . . ."

The procedural excesses embodied in the dual role of attorney McDonald permitted by the Commission and its failure to give notice and afford an opportunity to be

[28]Appendix, pp. 37 and 46. Under its debenture indenture, in order for Appalachian to issue additional mortgage bonds or other long-term debt (except for a refunding), Appalachian must have earnings coverage before income tax of at least twice the pro forma total annual interest charges on its bonds and such other debt. Thus, entirely apart from the requirements of the market place, to sell additional debt securities Appalachian must have coverage in excess of two times in order to cover the interest charges on the new securities. The coverage figures relied upon by the Commission do not include any additional interest associated with new long-term debt.

[29]Appendix, pp. 37, 46; and pp. 9(n.1), 12 and 13 of the Statement dated April 22, 1975, *infra*, p. 12 (n.19).

heard prior to issuance of its September 16, 1974 order are discussed under separate headings herein.

Even if these manifold departures from the constitutional requirements of procedural due process did not undermine this proceeding, the stale evidentiary base alone would require consideration of Appalachian's actual results for the refund period July 29, 1971 through December 31, 1973. The overwhelming weight of authority supports the view that prior to ordering refunds, a regulatory body must examine the Company's actual experience during the refund period. See, *e.g.*, *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio (No. 2)*, *supra*, p. 82; *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U.S. 151, 163 (1934); *Williams* v. *Washington Metropolitan Area Transit Commission*, 415 F.2d 922, 946 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1081 (1969); and *New York Telephone Company* v. *Public Service Commission of New York*, 29 N.Y.2d 164, 169, 324 N.Y.S. 2d 53, 55, 272 N.E. 2d 554, 557 (1971). This Court has cogently stated:

> "There are times, to be sure, when resort to prophecy becomes inevitable in default of methods more precise. At such times, 'an honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances' . . . is the only organon at hand, and hence the only one to be employed in order to make the hearing fair. But prophecy, however honest, is generally a poor substitute for experience. 'Estimates for tomorrow cannot ignore prices of today.' . . . [citations omitted]" *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio (No. 2)*, *supra*, p. 82.

A recent proceeding involving the New York Telephone Company is instructive. The company filed tariff revisions on March 20, 1969 designed to produce increased revenue of $175 million. On February 24, 1970

the company was permitted to increase its rates subject to refund by approximately $136 million. By orders dated July 1 and September 1, 1970, the New York Public Service Commission determined that, based on the test year 1968, the company was entitled to increase its revenues by only $120 million and it ordered the company to refund amounts collected at temporary rates in excess of the lower rates ultimately determined to be reasonable.

Just prior to the Commission's order of July 1, 1970, and more than 8 months after the hearings had concluded, New York Telephone filed a request that the record be reopened to permit introduction of evidence concerning the company's actual earnings experience since the record was closed. The Commission denied this request.

On review, the New York Court of Appeals held that the ordering of refunds based only upon out-of-date evidence and the refusal to reopen the hearing was arbitrary. The Court said:

> "The law is well-settled that the Commission may not rely on a reckoning when actual experience is available and establishes that the predictions have been substantially incorrect. . . . This principle applies not only in cases where the rate proceeding fixes the rate but *especially where the Commission directs refunds*. . . .
>
> An attempt to give prediction first place and experience the second is barred whether the attempt is made by the utility or the officers of government prescribing rates. In either case, the subscribers . . . as well as the Company, must be given a full hearing. Under the unusual circumstances of this known experience in this case, to compel the Company to accept the substantially inaccurate determination of the Commission is to deny it due process." *New York Telephone Company* v. *Public*

Service Commission of New York, supra, pp. 169-171, 324 N.Y.S. 2d pp. 55-57, 272 N.E. 2d pp. 556-557. [emphasis supplied].

In fact, the excluded evidence regarding Appalachian's earnings in the refund period is the best and only judicially acceptable measure of constitutional rates; yet this information was excluded despite diligent efforts by Appalachian to place it in the record. When a party has been barred from placing in the record in a judicial proceeding data basic to the determination of a constitutional issue, this constitutes a denial of due process. *Georgia Ry. & Electric* v. *Decatur, supra*, pp. 170-171. Unless this Court can say that the evidence offered by Appalachian of its actual results for the refund period "could not conceivably establish that the action of the [Commission] in imposing the [rate schedule] was arbitrary and unreasonable", an opportunity to present this evidence should be allowed as a matter of right. *Nashville, Chattanooga & St. Louis Ry.* v. *Walters*, 294 U.S. 405, 415-416 (1935). The consideration of actual operating results for the period July 29, 1971 through December 31, 1973 is a fundamental prerequisite to assuring a proper measure of the rudiments of fair play which are necessarily included in the Fourteenth Amendment. *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio (No. 2), supra*, p. 81; *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio, supra*, p. 304.

The Dual Roles of Attorney McDonald Have Deprived Appellant of Its Constitutional Right to Procedural Due Process of Law

Appellant's fundamental right to procedural due process was further abridged when the Commission and the West Virginia Court permitted attorney McDonald to occupy roles as counsel for an intervenor throughout

the hearings and as staff counsel for the Commission throughout the Commission's decisional process.

It is fundamental that the procedural due process requirements of the Fourteenth Amendment to the Constitution of the United States mandate a fair and impartial hearing and decision in fixing rates. This requirement and its rationale were thoroughly set forth by this Court in *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio, supra*, pp. 304-305:

> "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. . . .Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard'. . .of a fair and open hearing be maintained in its integrity. . . .The right to such a hearing is one of 'the rudiments of fair play'. . .assured to every litigant by the Fourteenth Amendment as a minimal requirement. [citations omitted]"

Also, see generally *Morgan I, supra*, p. 480. In its second hearing of the *Morgan* case, *Morgan* v. *United States*, 304 U.S. 1, 22 (1938) (hereinafter cited as *"Morgan II"*), this Court stressed the importance of maintaining proper "fair play" standards in the conduct of administrative proceedings:

> "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said

> at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

Although it has been held that due process is an elusive concept, that its exact boundaries are indefinable, and that its content varies according to specific factual contexts [*Hannah* v. *Larche*, 363 U.S. 420, 442 (1960); *Davis* v. *Ann Arbor Public Schools*, 313 F. Supp. 1217, 1225 (E.D. Mich. 1970); and *Whitfield* v. *Simpson*, 312 F. Supp. 889, 894 (E.D. Ill. 1970)], an administrative hearing of such importance and vast potential consequences as the one under review

> ". . . must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process." *Amos Treat & Co.* v. *Securities and Exchange Commission*, 306 F.2d 260, 267 (D.C. Cir. 1962).

See also, *Cinderella Career and Finishing Schools, Inc.* v. *Federal Trade Commission*, 425 F.2d 583, 591 (D.C. Cir. 1970); *Texaco, Inc.* v. *Federal Trade Commission*, 336 F.2d 754, 760 (D.C. Cir. 1964); and *Wall* v. *American Optometric Association, Inc.*, 379 F. Supp. 175, 188 (N.D. Ga. 1974), *aff'd mem.*, 419 U.S. 888.

The chameleon-like roles of attorney McDonald unquestionably have tainted the appearance of fairness in this long proceeding. The Commission's decision, its gratuitous remarks about his brief,[10] and the end result of the decision itself lend conclusive support to the

[10] Appendix, p. 16.

proposition that his role as an advocate for an intervenor and then for the Commission transcend normal bounds of advocacy.

In the capacity of private advocate, attorney McDonald, through more than 140 transcript pages of cross-examination, dutifully and exhaustively represented the interests of his client, an intervenor which strenuously opposed Appalachian's proposed rates. Thereafter, ten days before the hearings terminated, attorney McDonald assumed the role of Commission Staff counsel where, in his official capacity, he submitted a brief that was signed and apparently was prepared largely by him, advising the Commission of the Staff position, which was substantially in opposition to Appalachian's application for rate relief. Two of the three commissioners who heard parts of the evidentiary record had since resigned from the Commission, and the Commission placed substantial reliance upon the Staff's brief, which the Commission chose to characterize as "the only one to attempt to come to grips with most, but not all, of [the issues in the case]."[11] Indeed, many of the conclusions and recommendations of this brief were incorporated by the Commission in its order of January 31, 1975.

Certainly, the "very appearance," if not the actuality, of complete fairness in the proceeding before the Commission was corrupted by the inconsistent roles played by the same attorney in the same administrative proceeding. In a proceeding of such public importance,[12] not even the appearance of complete fairness should be sacrificed.

[11] *Ibid.*

[12] Ultimately, the proceeding will affect nearly every resident of Appalachian's West Virginia service territory, which encompasses about one-half of the State of West Virginia.

The actions of attorney McDonald in this proceeding are closely akin to the situation facing the court in *General Motors Corporation* v. *New York*, 501 F.2d 639 (2d Cir. 1974), where the attorney in question had worked for the Justice Department and was thereafter retained by the City of New York to bring a class action in a matter nearly identical to one he had participated in when he was in Federal employment. In disqualifying the attorney from participating in the City's case, the court relied heavily upon Canon 9 of the Code of Professional Responsibility,[11] which provides:

> "A lawyer should avoid even the appearance of professional impropriety."

The court noted that Disciplinary Rule 9-101(B) provides a measure of specificity to this general caveat and commands:

> "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

After review of the facts, the court concluded:

> "Accordingly, without in the least even intimating that [the attorney] himself was improperly influenced while in Government service, or that he is guilty of any actual impropriety in agreeing to represent the City here, we must act with scrupulous care to avoid any *appearance* of impropriety lest it taint both the public and private segments of the legal profession." *General Motors, supra*, p. 649.

A novel reversal of the situation contemplated in

[11] The Code of Professional Responsibility, including Canon 9, appears in the Appendix to the West Virginia Code in Vol. 1 (1973 Replacement Volume), Appendix, p. 445.

General Motors, supra, and Disciplinary Rule 9-101(B) is presented here by the dual role of attorney McDonald —an attorney who, on behalf of a private litigant, actively participated throughout the hearings before the Commission and then, as a public employee of the Commission, continued to participate actively in the very same proceeding.

Public confidence in the administrative process must be preserved. *Morgan II, supra*, p. 15. Public confidence in the affairs of government cannot help but be seriously undermined if an attorney can appear to influence the outcome of a proceeding by switching sides during the course of that proceeding, regardless of whether or not the outcome is actually altered. The inescapable fact is that public faith in the integrity of the regulatory process would have been severely eroded if Appalachian's counsel had "switched sides" during the course of the proceeding, had occupied an official position next to the Commission itself, had written the brief on behalf of the Commission Staff, and the Commission had thereafter approved Appalachian's requested increase in its entirety. The integrity of the regulatory process has here been unconditionally compromised in exactly this manner by the Commission's acquiescence in attorney McDonald's dual role.

It is axiomatic that if the order appealed from is found to be premised upon an unfair hearing then such order must be set aside and the case remanded for a new hearing:

> "The due process requirement of a fair hearing is unwavering even though the findings of an unfair hearing might otherwise be justified on the merits." *Great Lakes Screw Corporation* v. *N.L.R.B.*, 409 F.2d 375, 382 (7th Cir. 1969).

> "Nor will the fact that an examination of the record shows that there was evidence which would support the judgment, at all save a trial from the charge of unfairness . . . . Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand." *N.L.R.B.* v. *Phelps*, 136 F.2d 562, 563-564 (5th Cir. 1943).

Although it is not known to what extent the attorney's behavior may have affected the Commission's ultimate decision, the very appearance of unfairness requires that the Commission orders should be set aside.

The Commission's Order of September 16, 1974 is Void for Failure to give Notice and Opportunity to be Heard

Without first giving to Appalachian any notice or opportunity to be heard, the Commission entered an interim order on September 16, 1974[14] in this same rate proceeding (Case No. 7083) ordering Appalachian to cease and desist immediately "its practice of 'repricing' coal purchased from affiliated interests for inclusion in the Fuel Adjustment Clause. . . ."

The Commission issued this cease and desist order despite the fact that Appalachian, with full knowledge of the Commission, was pricing coal purchased from affiliated interests strictly in accordance with tariffs duly filed with the Commission. Appalachian's tariff filed on February 22, 1971 and made effective July 29, 1971 provided that "[f]or the purpose of computing fuel costs under this fuel clause, the price paid for coal will be based solely on purchases from non-affiliated mines." Such pricing based "solely on purchases from non-affiliated mines" was in compliance with the Commission's

[14]Appendix, p. 1.

policy as embodied for many years in Appalachian's duly approved fuel clauses.

It is, of course, a fundamental precept of American jurisprudence that no person shall be deprived of life, liberty or property without due process of law. A basic element of due process, guaranteed by the Fourteenth Amendment to the United States Constitution, is the right to a hearing based upon adequate notice.

This Court has clearly recognized the right to notice and hearing. In *Interstate Commerce Commission* v. *Louisville and Nashville R.R.*, 227 U.S. 88, 91 (1913), the Court observed:

> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' . . . or if the facts found do not, as a matter of law, support the order made . . . . [citations omitted]"

The principle that an individual or a corporation is entitled to at least notice and a hearing before an administrative agency issues an order affecting fundamental rights was so clear to the court in *A. E. Staley Mfg. Company* v. *United States*, 310 F. Supp. 485, 488 n.4 (D. Minn. 1970), that it held without discussion that "[o]f course, an order issued without the benefit of notice, a hearing and a record on which the order is based is void. [citations omitted]" See also, *Hoxsey Cancer Clinic* v. *Folsom*, 155 F. Supp. 376, 378 (D.D.C. 1957).

It has long been settled that an administrative proceeding of a quasi-judicial character carries with it the fundamental procedural requirement of a full hearing in which evidence is received and weighed by the trier of

facts. *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio, supra*, p. 304-5 and cases cited therein; *Morgan I, supra*, p. 480.

Without any notice or hearing, the Commission ordered Appalachian to cease and desist certain practices which conformed to its tariffs on file with the Commission. The Court has found that:

> "a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal [citations omitted]." *Londoner* v. *Denver*, 210 U.S. 373, 386 (1908).

The procedure followed by the Commission and the West Virginia Court in this case has denied Appalachian the basic right to a hearing and may set a dangerous precedent for similar actions in the future. It is submitted that the Commission's order of September 16, 1974 is void.

West Virginia Code, Chapter 24, Article 5, Section 1, as Applied herein, is Repugnant to the Constitution of the United States

West Virginia Code, Chapter 24, Article 5, Section 1, as applied by the West Virginia Court in this case, is repugnant to the Fourteenth Amendment of the Constitution of the United States.

Where there has been a legislative determination promulgated by the Commission such as that embodied in the rate order of January 31, 1975, as amended, it is elementary to due process that there must be an avenue of judicial review available to the party whose action is regulated by the legislative determination. Appalachian, as the party affected, first sought quasi-judicial review before the Commission, but such review was denied by

the Commission's order of March 21, 1975. The statutorily prescribed procedure for review of the Commission's action appears at West Virginia Code, Chapter 24, Article 5, Section 1, and provides for appeal directly to the Supreme Court of Appeals of West Virginia, the highest court of that state. Appalachian therefore sought such review by application filed April 7, 1975 with the West Virginia Court.

Appalachian submits that under the facts of this case, where Appalachian has challenged the rates established as confiscatory, where refunds have been ordered based upon those rates and where the basis for the rates is a test period more than four years old at the time rates were set, judicial review required to satisfy due process must include consideration of the actual experience of the Company during the refund period. *Baltimore & Ohio R.R.* v. *United States, supra*, pp. 368-369. West Virginia Code, Chapter 24, Article 5, Section 1, would on its face encompass such judicial review by the words ". . . the court shall decide the matter in controversy . . . ."[35] However, by its order of June 23, 1975, the West Virginia Court denied any review considering the Company's actual experience by summarily finding that Appalachian was not entitled to the relief requested in its petition. The West Virginia Court confirmed its summary disposition of Appellant's petition by denying on July 29, 1975 Appellant's motion for reconsideration and petition for rehearing without making any response to Appellant's assertion that, as applied in this case, West Virginia Code, Chapter 24, Article 5, Section 1, is repugnant to the Constitution of the United States.

If the Commission is free to decline to act in a judicial capacity to hear constitutional challenges to a rate

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[35] Appendix, p. 94.

schedule "enacted" by the Commission, and if the West Virginia Court, the only court authorized by statute to review orders of the Commission, is free to decline to judicially decide constitutional challenges to such rate schedules, then parties, such as Appalachian, will be precluded from litigating constitutional issues before any tribunal acting in a judicial capacity in violation of the Due Process Clause of the Fourteenth Amendment. Accordingly, Appalachian contends that West Virginia Code, Chapter 24, Article 5, Section 1, is repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States as the statute is construed and applied under the facts of this case by the highest court of the State of West Virginia.

Conclusion

This Court has jurisdiction of this appeal and should review the substantial questions which are presented.

Appalachian has been ordered by the Commission to refund to its customers in excess of $23 million applicable to the period July 29, 1971 through December 31, 1973. This order was issued in 1975, on the basis of a 1970 test year. Appalachian repeatedly has urged that the order of the Commission does not meet even the minimal standards of due process and repeatedly has sought an opportunity to present evidence to this effect before the Commission or other competent judicial forum. Appalachian not only has been refused a judicial hearing on the issue of confiscation, but the West Virginia Court has twice refused to review the constitutional issues raised. This Court is Appalachian's final resort.

This Court should note probable jurisdiction, or, in the alternative, vacate the final orders appealed from

and remand the case for the taking of evidence of Appellant's actual results from July 29, 1971 through December 31, 1973 and for decision thereon as herein described, and this Court should grant Appellant such further relief as it may deem appropriate.

Respectfully submitted,

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October 21, 1975